A

AMBANK (M) BHD

v.

LEE KING KEE & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[WRIT SUMMON NO: D8-22-222-2006]
10 MARCH 2008

C ***CIVIL PROCEDURE:*** *Summary judgment - Application for - Rules of the High Court 1980, O. 14 - Hire purchase agreement - Failure to recover balance of instalments unpaid -Whether there were triable issues raised*

D This was an appeal by the plaintiff against the decision of the deputy registrar in dismissing the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980. The plaintiff's case arose from a hire purchase agreement granted to a company Sumyu Knitting Factory Sdn Bhd in respect of a few sets of machines used for knitting business of the company. The E defendants were joint and several guarantors for the repayment under the hire purchase agreement *vide* letters of guarantee. The hirer company Samyu defaulted in payment of instalments under the hire purchase agreements. The plaintiff was unable to F repossess the machines as the said company first went into receivership and subsequently was wound up. One of the machines was sold off by the receiver and the proceeds (the sum of RM11,720) credited to the plaintiff's account. The plaintiff also failed to recover the balance of the instalments. The plaintiff's G claim against the guarantors was therefore for the balance of the instalments unpaid pursuant to the agreement. The defendants opposed the appeal on, *inter alia*, the following grounds: (i) the documents exhibited by the plaintiff were incomplete; (ii) the plaintiff had exhibited three of the four letters of guarantee leaving H the last one unexhibited and therefore unproved; (iii) the first letter of guarantee covering four sets of machines was defective in that it had provided for the plaintiff to grant the facility to the company under 'the hire purchase (Act)' and it was alleged that these four sets of machines did not come under the Hire Purchase Act 1967 I and (iv) the plaintiff was unable to prove that they were the owner of the four sets of machines before the hire purchase agreements covered by the first letter of guarantee were executed.

Held (entitling plaintiff to summary judgment):

(1) There was no triable issue to go for trial. The defendants who were directors of the company which took the hire purchase from the plaintiff were joint and several guarantors for the payment of the unpaid instalments. The plaintiff's claim herein was in respect of three guarantees although its statement of claim appeared to show there were four guarantees. In so far as the last guarantee was concerned, the plaintiff was unable to show that it existed. The order of the court should therefore be only in respect of what the plaintiff was able to show in this application in respect of the three guarantees leaving the fourth one outstanding. (para 9)

(2) There was no merit in the submission that the guarantees were not guarantees for hire purchase taken under the Hire Purchase Act 1967 merely because the first guarantee had put the word 'Act' in bracket. There is only one hire purchase act that is the Hire Purchase Act 1967. The hire purchase agreements signed by the company were clearly hire purchase agreements *per se* and not any other agreements. This was borne out by the resolutions of the company showing clearly the intention of that company to whom the defendants were themselves its directors that it had intended to take up the goods on hire purchase. (paras 10 & 11)

(3) It was not for the plaintiff to show that the goods had not been purchased by the plaintiff to be hired out to the company to constitute a contract under Hire Purchase Act 1967. The fact that they were purchased for the purpose of the hire purchase agreements was to be presumed as they were clearly mentioned in the said agreements. It would be for the defendants to prove otherwise which in this instance they had failed to do. Hence, the liabilities of the defendants were co-extensive with the liability of the company for whom they have stood as guarantors. (paras 11 & 12)

Case(s) referred to:

AmFinance Bhd v. KT Steel Sdn Bhd & Ors [2008] 1 CLJ 290 HC ***(refd)***
MBF Finance Bhd v. Low Ping Ming [2005] 1 CLJ 305 CA ***(refd)***

For the plaintif - Hargopal Singh; M/s Hargopal Singh & Co
For the defendants - GY Ang; M/s GY Ang & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: (Ex-tempore)

B **[1]** This is an appeal by the plaintiff against the decision of the deputy registrar in dismissing the plaintiff's application for summary judgment under O. 14.

[2] The plaintiff's case arose from a hire purchase agreement C granted to a company Sumyu Knitting Factory Sdn Bhd in respect of 6 sets of machines used for knitting business of the company.

[3] The defendants are joint and several guarantors for the repayment under the hire purchase agreement *vide* letters of D guarantees. The relevant paragraphs of the said letter of guarantee read as follows:

> … hereby unconditionally and irrevocably agree to undertake and continuously guarantee *jointly and severally to AMFB as follows:
>
> E …
>
> 2. I/We hereby further covenant *jointly and severally to indemnify AMFB against any loss or damages, cost and expenses (as conclusively certified by AMFB) incurred or suffered by AMFB arising out of or as a result of the non-observance, non-F compliance or non-performance by the Customer of any of the terms, conditions, covenants, stipulations and undertakings contained in the Agreements.

[4] The hirer company Samyu defaulted in payment of instalments under the 6 hire purchase agreements. The plaintiff G was unable to repossess the machines as the said company first went into receivership and subsequently was wound up. One of the six machines were sold off by the receiver and the proceeds (the sum of RM11,720) credited to the plaintiff's account. The plaintiff failed to recover the balance of the instalments.

H

[5] The plaintiff's claim against the guarantors are therefore for the balance of the instalments unpaid less the sum of RM11,720 pursuant to the agreement.

I **[6]** The appeal is opposed by the defendants on the following grounds: (verbatim by counsel for the defendants)

1. The documents exhibited by the plaintiff are incomplete. There are 4 letters of guarantee in respect of 6 machines. One of the letters of guarantee covers 4 sets of the machines. Another one covers 1 set of machine and another covers another set. Yet another covers another set.

2. The plaintiff had exhibited 3 of the 4 letters of guarantee leaving the last one unexhibited and therefore unproved. This letter of guarantee was stated in its letter of demand dated 17 July 2003.

3. On the first letter of guarantee respecting the 4 sets of machines was first dated 2 June 2001. Subsequently when we queried the plaintiff exhibited another set of guarantee respecting the same 4 sets of machines dated 22 June 2001. The defendants denied signing either of them. See para. 4 of encl. 7: "Saya menafikan keseluruhan afidavit Shirley dan meletakkan plaintif di bawah dasar bukti kukuh." (general denial).

4. We are not contesting the other two letters of guarantee which had been exhibited dated 2 February 2000 and 4 February 2000.

5. The other letter of guarantee dated 24 July 2001 was not exhibited. General denial challenged plaintiff to prove. See para. 21 of encl. 7: "Eksibit-eksibit "P2" dan "P3" dalam Afidavit Shirley tidak mengeksibitkan perjanjian jaminan yang kononnya bertarikh 2 February 2000 ataupun surat-surat pengesahan jaminan yang masing-masing yang kononnya bertarikh 22 Jun 2001 dan 24 Julai 2001.

6. The first letter of guarantee covering 4 sets of machines is defective in that it provides for the plaintiff to grant the facility to the company under "the hire purchase (Act)". These 4 sets of machines do not come under the Hire Purchase Act 1967. My understanding is that these goods are not covered under the Hire Purchase Act and therefore these 4 hire purchase agreements are not covered by the Hire Purchase Act. This goes against what is stated in the letter of guarantee which indicates that the guarantee was given under the Hire Purchase Act.

7. All the transactions covered by the first letter of guarantee are actually a disguised money lending transaction. The plaintiff was unable to prove that they were the owner of the 4 sets of machines before the hire purchase agreements covered by the first letter of guarantee were executed. See *MBF Finance Bhd v. Low Ping Ming* [2005] 1 CLJ 305 at 306 Held [1]:

> In order for the agreement to qualify as a valid hire purchase agreement, the appellant must be the owner of the vehicle at the time of its execution. The fact that the respondent had paid the initial payment did not make it the owner of the vehicle. The affidavits of the respondent revealed that it negotiated with the appellant for a loan as it could not pay the balance of the purchase price. On the day the agreement was executed the appellant had paid Avian the sum of RM160,000. This was followed by the endorsement of the ownership claim to the vehicle by the appellant in the registration card. The endorsement of ownership claim on the registration card of the vehicle meant that the respondent could not deal with the vehicle without the consent of the appellant as it did not have a claim or title to the vehicle. This made the appellant the owner of the vehicle for all intents and purposes. The claim of the appellant would prevail over the interests of the respondent even though the respondent was registered as the owner. Therefore, the appellant was the owner of the vehicle at the time of the execution of the agreement.

8. The Johor Bahru case of *AmFinance Bhd v. KT Steel Sdn Bhd & Ors* [2008] 1 CLJ 290 merely showing the agreement labeled as hire purchase agreement is insufficient to show that it is a hire purchase agreement. The plaintiff must prove on a substantive basis that the agreement is a hire purchase agreement.

[7] Reply By The Counsel For The Plaintiff Supporting The Appeal (Verbatim)

1. With regards to the letters of guarantee, the defendants' counsel had admitted that the 3 letters of guarantee exhibited do cover all the 6 sets of machines and there are only 6 sets of machines. These are what we are claiming in our O. 14 application although our statement of claim mentioned another one guarantee which appears to be superfluous.

2. There is only one master guarantee dated 22 June 2000 and no two copies. The other copy was blur and shows 2 June 2000 leaving out uncaptured figure "2". This can be examined by comparing the two documents which are similar and congruent in all respects.

3. The defendants had made a general denial with respect to the execution of the first guarantee. The plaintiff has exhibited other documents that bear the same signature (which had not been challenged).

4. The guarantees had never been disputed until the filing of this suit. They are now estopped from doing so. As late as 18 September 2002 the hirer company had admitted the hire purchase agreements and had requested for restructuring of repayment of the hire purchase. They had not condescended to their denial particularly the board resolution passed by the hirer company that expressly states that the hire purchase be jointly and severally guaranteed by the defendants and signed by the defendants as directors of the hirer company.

5. In explaining the facility, the letter of guarantee provides "subject to and upon conditions more particularly set up in AMFB's letter of offer dated 31 May 2001". The letter of offer is also exhibited which has been executed by the hirer company and also confirmed in the board resolution. The board resolution also refers to the said letter of offer. Therefore the defendants and the hirer company were fully aware of the nature of the hire purchase agreements that they entered into. The hire purchase agreements were entered pursuance to the board resolution.

6. The hire purchase agreements are not a sham for the following reasons:

   (i) they had been signed by the defendants on behalf of the hirer company. As directors of company they must have been well aware of the nature of the documents they executed;

   (ii) the board resolutions referred to these agreements as hire purchase;

   (iii) the guarantees executed by the defendants referred to these agreements as hire purchase;

(iv) the request for restructuring of these agreements refers to them as hire purchase;

(v) there is therefore no doubt that the hirer company was fully aware of the nature of these agreements. See *MBF Finance Bhd v. Low Ping Ming, supra.*

Findings And Decision

[8] Having heard the parties it is clear to me that there is no triable issue to go for trial. It is clear that the defendants who were directors of the company which took the hire purchase from the plaintiff were joint and several guarantors for the payment of the unpaid instalments.

[9] In so far as the plaintiff's claim goes in this application they are in respect of 3 guarantees although its statement of claim appears to show there were four guarantees. In so far as the last guarantee is concerned the plaintiff is unable to show in this application that it existed. The order of the court should therefore be only in respect of what the plaintiff is able to show in this application that is to say only in respect of the 3 guarantees leaving the fourth one outstanding.

[10] There is no merit in the submission that the guarantees were not guarantees for hire purchase taken under the Hire Purchase Act 1967 merely because the first guarantee had put the word "Act" in bracket. There is only one hire purchase act that is to say the Hire Purchase Act 1967. This is insignificant.

[11] It is clear that the parties can contract under the Hire Purchase Act 1967 although the subject matter of the hire purchase may be outside the categories of goods mentioned in the First Schedule the only difference being in the case of goods falling under the First Schedule additional requirements with respect to repossession may have to be satisfied such as serving of notice under the Second Schedule, etc. The hire purchase agreements signed by the company were clearly hire purchase agreements *per se* and not any other agreements. This is borne out by the resolutions of the company showing clearly the intention of that company of whom the defendants were themselves its directors that it had intended to take up the goods on hire purchase. It is not for the plaintiff to show that the goods had not been purchased by the plaintiff to be hired out to the

company to constitute a contract under the Hire Purchase Act 1967. The fact that they were purchased for the purpose of the hire purchase agreements is to be presumed as they were clearly mentioned in the said agreements. It would be for the defendants to prove otherwise which in this instance they had failed to do.

[12] The liabilities of the defendants are co-extensive with the liability of the company for whom they have stood as guarantors. The plaintiff is entitled to summary judgment as prayed with costs.